DISTRICT OF COLUMBIA
OFFICE OF ADMINISTRATIVE HEARINGS
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STODDARD BAPTIST NURSING HOME, Appellant, v. DISTRICT OF COLUMBIA DEPARTMENT OF HEALTH, Appellee.	Case No. BA-C-04-80015 BA-C-06-80021 (Consolidated)

ORDER TO REMAND

Appellant, Stoddard Baptist Nursing Home, appeals from the District of Columbia Department of Health's (DOH) denial of Stoddard's claims for payments under the District's Medicaid program arising out of Stoddard's operations in 2002 and 2003. The District contends that Stoddard's requests were not timely. For reasons discussed below, I conclude that Stoddard's requests were timely under the controlling statutes and regulations and remand this case to DOH to process Stoddard's claims.

I. Findings of Fact

The facts underlying this appeal were stipulated by the parties. They may be summarized as follows.[1]

[1] The parties proceeded through cross-motions for summary judgment based on stipulated facts and supplemented by oral argument.

The District of Columbia Medicaid Program, like programs in all of the states, is established and operated under guidelines from the federal government. Health care providers who treat Medicaid patients are paid under a formula that is prescribed in the District of Columbia State Plan for Medical Assistance. Stip. ¶ 1,[2] *see* 29 District of Columbia Municipal Regulations (DCMR) 900 *et seq.* The District's Plan, in turn, is required to be approved by the federal Department of Health and Human Services (HHS) to be eligible for federal funding. 42 C.F.R. § 430.12.

Prior to 1996 the District Plan provided for reimbursement to nursing facilities based on the facilities' costs. The provider would submit an accounting of its costs and the DOH Medical Assistance Administration (MAA) would then issue a notice of program reimbursement (NPR) stating the amount that would be paid. Federal regulations, which were incorporated by reference into the District regulations, required that any request for exception to or exemption from the cost limits be filed within 180 days of the date the NPR was issued. Stip. ¶ 3 and Ex. C; 29 DCMR 951.11 (1996); 42 C.F.R. 413.30(f); Medicare Provider Reimbursement Manual (PRM), Health Care Financing Administration Pub. 15, §§ 2531-2536.

On October 1, 1996, DOH implemented a new methodology for payments to nursing facilities. Stip. ¶ 1 and Ex. A. The District Plan was amended to establish a prospective payment system (PPS) under which nursing facilities would be paid a set per diem rate for its services. MAA no longer issued NPRs under the new system.

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[2] Refers to the parties' agreed stipulation of facts.

Nevertheless, the issuance of an NPR remained the prescribed marker to establish the time in which a nursing facility was required to request an exception from the per diem cost ceilings established under the PPS system. Under the new system a nursing facility retained the right to request an exception from the Medicaid operating cost ceilings. Stip. ¶ 2 and Ex. B; 29 DCMR 951.10 (1998). The regulations, in turn, incorporated the procedures of the PRM, which required that the request be filed within 180 days of the issuance of the NPR. Stip. ¶ 3 and Exs. B and C; 29 DCMR 951.11 (1998); PRM ¶ 7544I (A)(2).

In 2001 and 2002 Stoddard applied for an exception to the PPS cost limits on the grounds that its resident population was "atypical" and required more intensive care and treatment than the PPS guidelines contemplated. Stip. ¶ 8. Stoddard's request for Fiscal Year (FY) 2000, ending December 31, 2000, was submitted on June 29, 2001, 180 days after the close of the fiscal year. Stoddard's request for FY 2001, ending December 31, 2001, was submitted on December 2, 2002, 336 days after the close of the fiscal year. Stip. ¶ 9. The MAA approved both requests and paid Stoddard an "interim payment" "based on unaudited costs and subject to audit." Stip. ¶¶ 8, 9; Stip. Exhs. G, H.

In 2003 HHS eliminated exceptions to the Medicaid operating cost ceilings for nursing facilities and DOH revised its rules to conform to the federal guidelines. On February 21, 2003, DOH issued a notice of proposed rulemaking proposing to amend its regulations to delete the provisions for exceptions. Stip. ¶ 4 and Ex. D. A final notice deleting 29 DCMR §§ 951.10 and 951.11 was issued on June 27, 2003. Stip. ¶ 5 and Ex. E. The notice was silent concerning requests for exceptions involving services provided before the effective date of the amendment.

On July 10, 2003, 191 days after the fiscal year ended, Stoddard submitted a request for exception to the Medicaid costs ceilings for its FY 2002, ending December 31, 2002. Stip. ¶ 10 and Ex. I. MAA denied the request on August 15, 2003, on the grounds that it was received "two weeks after the final rulemaking" that eliminated exceptions. Stip. Ex. J. The letter did not state that it was a final determination and did not attach a statement of appeal rights. On March 29, 2004, counsel for Stoddard sent MAA a letter requesting that MAA either grant the exception Stoddard requested or issue a formal denial within 15 days specifying Stoddard's appeal rights. Stip. ¶ 12 and Ex. K. When MAA did not respond, Stoddard filed an appeal to the Board of Appeals and Review on April 19, 2004. The appeal was transferred to OAH pursuant to D.C. Official Code §§ 2-1831.02(a) and 2-1831.03(a)(3) and docketed as case No. BA-C-04-80015.

Stoddard also requested an exception for costs it incurred in FY 2003 prior to the effective date of the new DOH rule. On November 14, 2004, 319 days after the end of the fiscal year, Stoddard submitted a request to MAA for an exception to the Medicaid nursing facility operating costs ceilings for its FY 2003 ending December 31, 2003. Stip. ¶ 15 and Ex. L. Stoddard renewed its request on January 26, 2005. Stip. ¶ 16 and Ex. M. On March 10, 2006, Stoddard sent MAA a letter demanding that the agency either grant the exception request or issue a formal denial within 15 days. Stip. ¶ 17 and Ex. N. MAA then denied Stoddard's request on March 22, 2006. Stip. ¶ 18 and Ex. O. In contrast to its rationale for denying Stoddard's fiscal year 2002 request, MAA did not assert that the request was untimely because it was submitted after the new rules took effect on June 27, 2003. The rationale of the March 10, 2006, denial was that: "Consistent with the Medicare guidelines, if the request is filed more than 180 days after

the close of the affected cost reporting period, the provider is not eligible for an exception for that cost-reporting year." Stip. Ex. O. MAA did not cite the specific Medicare guidelines to which the letter referred.

Stoddard filed an appeal to OAH on March 31, 2006. The appeal was docketed as case No. BA-C-06-80021.

II. Conclusions of Law

A. Jurisdiction

The jurisdictional underpinning of these claims is far from clear. District of Columbia regulations provide that a Medicaid provider who disagrees with a decision of the Department of Health may file a notice of appeal with the Board of Appeals and Review within 30 days of the issuance of an NPR or within 45 days of a response to a request for informal review. 29 DCMR 978.1, 978.5. The Office of Administrative Hearings has now assumed jurisdiction over cases that previously were appealed to the Board of Appeals and Review. D.C. Official Code § 2-1831.03(a)(3).

In this case, no NPRs were issued. Neither party has addressed the issue of whether the DOH action here constituted an "informal review" within the meaning of the District regulations. The DOH letter of August 15, 2003, denying Stoddard's Fiscal Year 2002 request for an Exception, contained no notice of appeal rights. Stip. ¶ 14 and Ex. J. The letter of March 22, 2006, denying Stoddard's Fiscal Year 2003 request for an Exception, referred to the "requirements set forth in 42 C.F.R. 405.1801," and advised that Stoddard's notice of appeal "must be filed within 30 days of the date of this

determination." 42 C.F.R. 405.1801 (a) defines an "intermediary determination" and an "intermediary hearing" as the terms apply to Medicaid appeals, but does not reference any time in which to appeal or describe the decision from which an appeal may be taken.

Despite these ambiguities, I conclude that OAH has jurisdiction to determine these appeals. The parties have stipulated that the MAA's letter of March 22, 2006, denying Stoddard's request for an exception for Fiscal Year 2003, was a formal denial. Stip. ¶ 18. The letter contained a statement of appeal rights. Stip. Ex. O. Stoddard filed a timely appeal with the Office of Administrative Hearings on March 31, 2006 (Case No. BA-C-04-80021).

The parties also stipulated that MAA denied Stoddard's Fiscal Year 2002 exception request by letter of August 15, 2003. Stip. ¶ 11 and Ex. J. Stoddard did not appeal this denial to the Board of Appeals and Review until April 19, 2004, after it requested but did not receive a formal denial of the exception request. Stip. ¶¶ 11, 12, 13. "The time limits for filing appeals with administrative adjudicative agencies, as with courts, are mandatory and jurisdictional matters." *Zollicoffer v. D.C. Public Schools*, 735 A.2d 944, 945-46 (D.C. 1999) (citations omitted). But it does not follow that OAH, as successor to the BAR, lacks jurisdiction because Stoddard's appeal was filed more than 30 or 45 days after MAA's denial. The Court of Appeals also confirmed in *Zollicoffer* that "ambiguity of notice to the petitioner regarding the length of the appeal period renders that notice 'inadequate as a matter of law' to trigger the operation of the statutory time limitation." *Id.* at 948 (quoting *Ploufe v. D.C. Dep't of Employment Servs.*, 497 A.2d 464, 466 (D.C. 1985). The parties agree that MAA did not give Stoddard any notice of its appeal rights. Stip. ¶ 11. It follows that Stoddard's time for appeal was

tolled and that its appeal on April 19, 2004, before it received any notice of appeal rights, was timely.

B. The Standard of Review

The starting point for review of an action of a District Government agency is the District of Columbia Administrative Procedure Act (DCAPA). In language that is nearly identical to that of the federal Administrative Procedure Act, the DCAPA provides that the reviewing court shall: "hold unlawful and set aside any action or findings and conclusions found to be: (A) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." D.C. Official Code § 2-510(a)(3). The standard is deferential to the agency. District courts, like their federal counterparts, have often confirmed that "an agency's interpretation of its own regulations or of the statute which it administers is generally entitled to great deference." *Genstar Stone Prod. Co. v. D.C. Dep't of Employment Servs.*, 777 A.2d 270, 272 (quoting *King v. D.C. Dep't of Employment Servs.,* 742 A.2d 460, 466 (D.C. 1999). Consequently, the District of Columbia Court of Appeals "will uphold the agency's interpretation unless it is unreasonable or contrary to the language or the legislative history of the statute." *Takahashi v. D.C. Dep't of Human Servs.*, No. 06-AA-1382, slip op. at 10 (D.C. May 22, 2008) (citing *McKenzie v.D.C. Dep't of Human Servs.*, 802 A.2d 356, 358 (D.C. 2002) and *Providence Hosp. v. D.C. Dep't of Employment Servs.,* 855 A.2d 1108, 1111 (D.C. 2004)).

The deference owed to an agency's interpretation of its statute or regulations is not unlimited, however, and varies with the nature of the agency's action. A reviewing

court owes an agency no deference in circumstances where the agency does not observe the procedural requirements of the DCAPA. *Washington Gas. Energy Servs., Inc. v. D.C. Public Serv. Comm'n*, 893 A.2d 981, 986-87 (D.C. 2006). Similarly, a reviewing court must reject an agency interpretation that contradicts the plain language of the underlying regulation. *Chagnon v. D.C. Bd. of Zoning Adjustment*, 844 A.2d 345, 348 (D.C. 2004) (citations omitted).

Agency interpretations, such as the MAA's interpretation here, warrant considerably less deference than agency rules themselves. "Traditionally, the least deferential standard of review has been applicable to so-called interpretative rules, whereby an agency informs the public what it thinks a statute means (as in program guidelines or informal rulings) without purporting to exercise law-making authority." *Reichley v. D.C. Dep't of Employment Servs.*, 531 A.2d 244, 248 (D.C. 1987); *cf. United States v. Mead Corp.*, 533 U.S. 218, 231-34 (2001) (holding that interpretative classification decisions by U.S. Customs were not entitled to the deference under *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984) that applies to rules promulgated after notice and comment.) The "degree of deference to be accorded to . . . [an] agency interpretation is a function of the process by which that interpretative ruling has been arrived at and the degree to which the agency's administrative experience and expertise have contributed to the process." *Genstar Stone Prods. Co. v. D.C. Dep't of Employment Servs.*, 777 A.2d 270, 273 (D.C. 2001).

It is in light of these principles that we review the MAA's action here.

C. Stoddart's FY 2002 Exception Request

Stoddard's request for an exception from Medicaid operating ceilings in its FY 2002 was denied on the grounds that exceptions to the established ceilings had been eliminated as of June 28, 2003. The MAA refused reimbursement because: "Your request for an Exception was received by MAA on July 14, 2003, two weeks after the final rulemaking." Stip. Ex. J.

MAA's letter did not elaborate as to why it considered that the effective date of the new rule barred applications for exceptions arising out of expenses that arose before the new rule took effect. MAA abandoned the rationale in its denial of Stoddard's request for an exception for FY 2003, which asserted that "if the request is filed more than 180 days after the close of the affected cost reporting period, the provider is not eligible for an exception for that cost-reporting year." Stip. Ex. O. In its motion and argument on summary judgment in the proceedings here, DOH made no attempt to defend the grounds it proffered for denying Stoddard's FY 2002 request. Instead, DOH urged that the 2002 request as well as the 2003 request was barred because it was submitted more than 180 days following the close of the fiscal year to which it applied. *See* Appellee's Mot. for Summ. Adj. at 5.

Although DOH defended its action in this tribunal on new grounds, my decision with respect to the 2002 request (BA-C-04-80015) can only consider the grounds on which the agency relied in its original denial. "An administrative order can only be sustained on the grounds relied on by the agency; we cannot substitute our judgment for that of the agency." *Jones v. D.C. Dep't of Employment Servs.*, 519 A.2d 704, 709 (D.C.

1987) (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 87-88 (1943)); *accord*, *Kralick v. D.C. Dep't of Employment Servs.*, 842 A.2d 705, 713 (D.C. 2004) (quoting *Jones*); *Walsh v. D.C. Bd. of Appeals and Review*, 826 A.2d 375, 380 (D.C. 2003) (quoting *Jones*).

The District's notices concerning the abolition of exception requests say nothing about restricting Medicaid providers' right to seek exceptions for costs incurred prior to the effective date of the new rule. The DOH Notice of Final Rulemaking states that: "These rules will change the rules governing computation of ceilings for purposes of determining the amount of reimbursement to nursing facilities by the Medicaid Program." Stip. Ex. E. The clear implication is that the rule is prospective because it changes the ceilings subject to reimbursement, not the procedure for reimbursement itself.

This interpretation of the DOH rule is consistent with the established principle that a statute "will not be construed as retroactive unless the act clearly, by express language or by necessary implication, indicates that the legislature intended retrospective application." Sutherland Statutory Construction §§ 41.02, 41.04 (Sands, 4th ed. 1986) (quoted in *United States v. Crutchfield*, 893 F.2d 376, 379 (D.C. Cir. 1990)); *see also Martin v. Hadix*, 527 U.S. 343, 358 (1999) (denying attorneys the benefit of a statutory increase in attorney's fees noting the "usual assumption that statutes are prospective in operation"). The policy of prospective application is particularly strong where, as here, "an agency's adjudication is a clear break with the past and a party reasonably relied to its detriment on the previous rule." *Reichley* 531 A.2d at 253. Therefore, I conclude that MAA's stated reason for denying Stoddard's Fiscal Year 2002 exception request was "[a]rbitrary, capricious . . . or otherwise not in accordance with law." D.C. Official Code § 2-510(a)(3)(A).

Moreover, even if it were appropriate to consider the new grounds asserted by DOH to justify its denial of Stoddard's FY 2002 request, I would rule that the denial was improper on the grounds I discuss below involving Stoddard's FY 2003 request. Therefore I remand the matter to DOH to consider the merits of Stoddard's FY 2002 request.

D. Stoddard's FY 2003 Exception Request

As noted above, MAA relied on different grounds to reject Stoddard's request for an exception from the Medicaid operating ceilings for the FY 2003. This request was denied on the grounds that it was submitted more than 180 days after the end of Stoddard's fiscal year. The sole rationale for the denial is that it was "[c]onsistent with the Medicare guidelines." Stip. Ex. O.

Stoddard challenges the MAA decision on the grounds that: (1) it contradicts the plain language of the regulations; (2) it reflects a change in the regulations that DOH could not implement without notice and comment rulemaking; and (3) it reflects a departure from MAA's previous policy that, at the very least, required a reasoned explanation. Mem. in Support of Appellant's Mot. for Summ. J. at 9-10. I find these arguments persuasive for reasons I discuss below.[3]

[3] Stoddard also urges that the changed DOH policy was required to be incorporated into its state plan and approved by the federal Health Care Financing Administration before it could be implemented. Mem. in Support of Appellant's Mot. for Summ. J. at 13. *See Oregon Ass'n of Homes for the Aging v. Oregon*, 5 F.3d 1239, 1244 (9th Cir. 1993). I do not reach this issue because I find adequate reason to reverse and remand the MAA decision on other grounds.

1. The DOH Interpretation Contradicts the Plain Language of the Governing Regulation.

Prior to the June 2003 amendment, applications for exceptions from Medicaid operating cost ceilings were governed by 29 DCMR 951.10 and 951.11. Stip. ¶ 2 and Ex. B. These regulations, in turn, incorporated federal guidelines:

> The Medicaid Program shall follow the Medicare guidelines set forth in 42 CFR 413.30(f) and the Medicare Provider Reimbursement Manual (PRM) 15, sections 2531 through 2536, in making a determination for granting an exception from the Medicaid operating cost ceilings . . . .

29 DCMR 951.11 (1998).

The deadline for submission of an exception request is specified in Section 2531 of the PRM:

> The request [regarding applicability of cost limits] may be filed prior to the beginning of, during, or after the close of the affected cost reporting period. However, the request must be filed with the intermediary no later than 180 days from the date of the intermediary's notice of program reimbursement (NPR). If the request is filed more than 180 days after the date on the notice of program reimbursement, the provider is not eligible for an exception or exemption for that cost reporting year.

Stip. Ex. C.[4]

By incorporating the PRM Guidelines, the DOH regulation linked a Medicaid provider's deadline for application to the issuance of an NPR. The parties do not dispute

[4] The parties implicitly agreed that the "intermediary" in this case is the District of Columbia MAA.

that the DOH regulation remained in effect until its repeal in June 2003 and that it governed Stoddard's applications here.

The parties also agree that, beginning in 1996, DOH stopped issuing NPRs. Stip. ¶ 1. Thus, for more than five years before Stoddard made the applications at issue here, it received payments from DOH in response to exception requests for which no NPR was issued. The parties have stipulated that Stoddard received "interim" payments from MAA in response to its applications for exceptions for Fiscal Years 2000 and 2001 and that DOH has not audited these requests. Stip. ¶¶ 8, 9. DOH urges that, in these circumstances, its interpretation of its rule to bar applications for exceptions filed more than 180 days after the close of the facility's fiscal year "does not conflict with the plain language of the Medicare regulation." Appellee's Mot. for Summ. Adjudication at 6.

I cannot accept DOH's contention. The applicable regulation, 29 DCMR 951.11, stated that the Medicaid Program "*shall follow* the Medicare guidelines set forth in . . . the Medicare Provider Reimbursement Manual (PRM) 15, sections 2531 through 2536." (Emphasis added.) The PRM, in turn, provided that an application for an exception "may be" filed after the close of the cost reporting period, but "must be" filed "no later than 180 days from the date of the intermediary's notice of program reimbursement (NPR)." Stip. Ex. C. The plain language of the regulation allows Stoddard to file an application for an exception at any time up to 180 days after an NPR has been issued.

The situation here is similar to that addressed by the District of Columbia Court of Appeals in *Chagnon v. D.C. Bd. of Zoning Adjustment*, 844 A.2d 345 (D.C. 2004), where the court held that a regulation that applied to a "child/elderly development center" could

not be interpreted to include a building for mentally retarded adults who were not elderly. The court observed that:

> The agency has considerable scope in construing language in a regulation that may be ambiguous. By the same token, however, it is our duty to reject an interpretation by the agency "which contradicts the plain language of the regulation itself." *Dell v. District of Columbia Dep't of Employment Servs., 499 A.2d 102, 106 (D.C. 1985)* (citing *Dankman v. District of Columbia Bd. of Elections & Ethics, 443 A.2d 507, 513 (D.C. 1981)* (en banc)); *see also Corridor H Alternatives, Inc. v. Slater, 334 U.S. App. D.C. 240, 245, 166 F.3d 368, 373 (1999)* ("While deference is normally due an agency's interpretation of its own rules, that is not the case where 'an alternative reading is compelled by the regulation's plain language,'" (quoting *Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512, 129 L. Ed. 2d 405, 114 S. Ct. 2381 (1994).*

844 A.2d at 348.

DOH contends that its interpretation of its regulation here is reasonable because Stoddard "has not received an NPR from MAA for services rendered beginning October 1, 1996," and "should have known that the exception payment was going to be eliminated . . . and taken steps to ensure that its request for an exception to the cost ceilings was timely filed." Appellee's Mot. for Summ. Adjudication at 6. This argument begs the question of what constitutes "timely" filing. Apart from its assertion that Stoddard should have prepared its request more expeditiously, DOH gives no reason for why a regulation that requires exceptions to be submitted within 180 days of issuance of an NPR should be interpreted to require that those exceptions be submitted within 180 days of the close of the provider's fiscal year. The regulation and the PRM say nothing about the fiscal year as a deadline of any sort. Indeed, the PRM allows submission of requests

"prior to the beginning of, during, or after the close of the affected cost reporting period." Stip. Ex. C. As Stoddard points out, as a matter of policy, it would be equally reasonable to require providers to submit their requests within 180 days of submission of their cost reports, which provide the information needed to determine whether the provider qualified for an exception.

DOH adverts to the Court of Appeals' opinion in *Acheson v. Schaeffer*, 520 A.2d 318, 321 (D.C. 1987), which observed that "countless administrative actions" involve statutory interpretation, and consequently "[n]ot every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule." Appellee's Br. at 7.

I find DOH's reliance on *Acheson* to be misplaced. In *Acheson,* the court held that a surveyor's treatment of land parcels did not require notice and comment rulemaking under the plain language of the governing statute.[5] Here, the agency's interpretation of its regulation is patently inconsistent with the plain language of that regulation. The DOH procedural change that ended the issuance of NPRs does not justify the agency's unannounced implementation of a change in the governing regulation that contradicts the language of the regulation itself.

[5] The issue in *Acheson* was whether a District of Columbia surveyor could properly interpret the term "subdivision," which was defined as "the division of a lot into 2 or more lots of record," to exclude circumstances in which parcels of land were assembled into a lot. 520 A.2d at 319. The court concluded, as a matter of statutory interpretation, that "the action taken by the Acting Surveyor did not fall within the Act's definition of 'subdivision.'" *Id.*

2. DOH Could Not Implement Its New Procedures Without Notice and Comment.

Even if we were to accept DOH's contention that its policy is consistent with the governing regulation, it does not follow that so abrupt a change can be implemented without notice and comment rulemaking. As a starting point, the DOH requirement fits within the definition of a "rule" in the DCAPA: It is a "statement of general or particular applicability and future effect, designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of the Mayor or of any agency." D.C. Official Code § 2-502(6)(A). The DOH policy here functioned as an amendment to the agency's existing rule. It follows that it could not be implemented without an opportunity for notice and comment from the public under the DCAPA, D.C. Official Code § 2-505.[6]

If we were to view the DOH policy shift as a change in the agency's interpretation of its rule rather than a change in the rule itself, proper rulemaking procedure would still be required in these circumstances. "When an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment." *Alaska Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999); *accord U.S. Telecomm. Ass'n v. FCC*, 400 F.3d 29, 35 (D.C. Cir. 2005). The DOH interpretation here

[6] The parties do not dispute that the DOH abolition of exception requests in 2003 was initiated in response to changes in federal law that abolished any exceptions to established cost ceilings. *See* Stip., Ex. E. Acquiescence in a federally mandated change does not require rulemaking. *Hamer v. Dep't of Human Servs.*, 492 A.2d 1253, 1257-58 (D.C. 1985). However, the issue here does not relate to the changes required by the new federal policy. It relates to the interpretation of policy as applied to exception requests under the prior law.

is not one that "is drawn linguistically from the actual language of the statute or rule," so that it is "not sufficiently distinct or additive to the regulation to require notice and comment." *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 588 (D.C. Cir. 1997). The rule itself makes no mention of the provider's fiscal year, and there is no way that the fiscal year, a marker of the deadline for submission of requests, can be inferred from the rule's designation of the NPR as the appropriate marker. It follows that DOH's novel policy cannot be implemented without notice and comment rulemaking.

3. DOH Was Required To Give a Rational Explanation for Its Change in Policy and To Apply the Policy Prospectively.

A third reason Stoddard urges for reversing the DOH decisions here is that the decisions reflect an abrupt, unexplained change in policy that should not have been implemented without providing a reasoned explanation. Again, I conclude that Stoddard's argument is persuasive.

Stoddard's applications for exceptions for its 2000 and 2001 fiscal years were approved by MAA without comment, although the 2000 request was submitted precisely 180 days after the close of the fiscal year and the 2001 request was submitted 336 days after the close of the fiscal year. Stip. ¶¶ 8, 9. Thus, Stoddard had reason to rely on MAA's past practice of approving exception requests that were submitted more than 180 days after the close of the fiscal year.

Agencies, like courts, "must and do favor a policy of *stare decisis* unless unusual circumstances intervene." *Reichley v. D.C. Dep't of Employment Servs.*, 531 A.2d 244, 247 (D.C. 1987). "Fairness, therefore, may demand purely prospective application of an

adjudicative rule when . . . a party to an adjudication announcing or applying a new rule reasonably relied . . . on a different rule established by an earlier agency adjudication." *Id.* at 248 (citations omitted). When an agency departs from its prior practice, it "must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. 1995) (quoted in *Springer v. D.C. Dep't of Employment Servs.*, 743 A.2d 1213, 1220 (D.C. 1999) and *Watergate East, Inc. v. Public Serv. Comm'n*, 665 A.2d 943, 947 (D.C. 1995)).

Here Stoddard reasonably relied on MAA's prior practice of to accept requests for exemptions without regard to the time that elapsed since the close of the fiscal year. MAA allowed Stoddard's previous request for FY 2001, although it was submitted 336 days after the close of the fiscal year.[7] Nor did MAA give Stoddard any notice of its interpretation of the 180 day deadline when Stoddard submitted its FY 2000 exception request precisely 180 days after the close of its fiscal year. At no time after MAA stopped issuing NPRs in 1996 did the agency announce its new policy or advise Stoddard of the policy.

Even if MAA's new interpretation of its rule had not required notice and comment rulemaking, such an abrupt change in agency policy required, at the very least, that MAA furnish a careful explanation of why it departed from its prior procedure. Moreover, if MAA sought to apply its policy retroactively, as it did in this case, the agency should have explained why retroactive application was necessary and equitable.

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[7] DOH contends that "[t]he approval of Stoddard's exception request for FYE 2001 was done in error." Appellee's Mot. for Summ. Adjudication at 8.

E. Summary

DOH's refusal to accept Stoddard's FY 2001 exception request because it was submitted more than 180 days after the close of the fiscal year must be set aside because it was arbitrary, capricious, and not in accordance with law. DOH interpreted its regulation in a manner that was inconsistent with the plain language of the regulation. Its policy changed the regulation without the opportunity for notice and comment required by the DCAPA. Even if notice and comment were not required, the agency's abrupt departure from its prior policy required prospective application of the new rule and a reasoned explanation for the changes. Because DOH failed to adhere to these basic principles of administrative law, its decision will be reversed and remanded for further proceedings.

IV. Order

Accordingly, it is that **5th** day of **June, 2008:**

ORDERED, that, in Case No. BA-C-04-80015, Appellee's decision of August 15, 2003, denying Appellant's FY 2002 Request for Exception to Operating Ceilings, is **REVERSED AND REMANDED** for further proceedings consistent with this Final Order; and it is further

ORDERED, that, in BA-C-04-80021, Appellee's decision of March 22, 2003, denying Appellant's FY 2003 Request for Exception is **REVERSED AND REMANDED** for further proceedings consistent with this Final Order.

/s/
Nicholas H. Cobbs
Administrative Law Judge